

Care Initiatives, Inc., d/b/a Indian Hills Care Center and Christine E. Ryan. Case 18-CA-13466

May 8, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, COHEN, AND FOX

On December 15, 1995, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by, inter alia, discharging Charging Party Christine Ryan. To remedy this unfair labor practice, the judge recommended that the Respondent take the following affirmative actions:

- Offer Ryan immediate reinstatement
- Remove from its files any reference to Ryan's unlawful discharge
- Make Ryan whole for any loss of earnings and other benefits
- Preserve and make available to the Board all records necessary to compute the amount of backpay due
- Post a notice to employees immediately upon receipt
- Notify the Regional Director within 20 days of the steps the Respondent has taken to comply

These are the typical Board remedies for an unlawful discharge. In order to better effectuate the policies of the Act, however, we have decided that henceforth these standard Board remedies should be modified in the following three respects.³

¹No exceptions were filed to the judge's finding that portions of the Respondent's Employee Handbook and Handbook for Non-Manual Staff violated Sec. 8(a)(1) of the Act.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³It is well settled that the Board has "broad discretionary" authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. E.g., *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969). It is also firmly established that remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions. E.g., *Schnadig Corp.*, 265 NLRB 147 (1982); *R. J. E. Leasing Corp.*, 262 NLRB 373 *fn.* 1 (1982) (modified decision).

(1) At present, no time limits are specified for most affirmative actions that are required by the Board's Orders. For example, although the Board traditionally orders a respondent to post a notice "immediately upon receipt" and to offer a discriminatee "immediate" reinstatement, there is no specific period of time prescribed in the Order within which these actions are to be taken. This lack of specificity has resulted in disagreements between respondents and Board personnel over the meaning of the word "immediate" and has hampered the Agency's efforts to secure expeditious compliance. Accordingly, we have decided to clarify our Orders by including specific time deadlines for posting the notice, offering reinstatement, expunging files, and making records available to the Board.⁴

(2) Consistent with our decision to specify time limits for these affirmative actions, we believe that the respondent should, within 21 days after service by the Region, file with the Regional Director a sworn certification, on a form provided by the Region, attesting to the steps that the respondent has taken to comply.⁵ The use of such a form will greatly assist the Regions in their efforts to determine whether a respondent is or is not complying with each of the affirmative provisions of the Board's Order. Most importantly, this requirement will place the onus on the respondent, who is the wrongdoer, to certify its own compliance, and will relieve the Region of the responsibility of determining in each case whether all the necessary steps have been taken. If the respondent does not certify that it has complied, the Region can take the necessary legal steps to secure compliance, without the necessity of expending more of the Board's scarce resources to investigate the extent of the respondent's compliance.

(3) At present, the standard Board Order provides for posting of the notice at the respondent's facility. If the record indicates that the respondent's facility has closed, the Board routinely provides for mailing of the notice to employees.⁶ If, however, the record fails to reflect this fact or if the closing occurs after the issuance of the Board's decision, there is no provision in the Order to ensure that employees are notified of the outcome of the Board proceeding. Accordingly, we shall modify our standard notice-posting provision to state that if the respondent's facility has closed, the respondent shall mail the notice to employees.

⁴The deadlines are as follows: Within 14 days after service by the Region, the respondent shall post the notice; within 14 days from the date of the Order, the respondent shall offer reinstatement and expunge its files (the respondent shall notify the employee of the expunction within 3 days thereafter); and within 14 days of a request, the respondent shall make its records available to the Board.

⁵This certification-of-compliance provision will take the place of the notice-of-compliance provision presently appearing in Board Orders.

⁶E.g., *Wheelco Co.*, 260 NLRB 867, 868 *fn.* 7 (1982).

With these modifications, we adopt the judge's recommended Order and set it forth in full below.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that Care Initiatives, Inc., d/b/a Indian Hills Care Center, Sioux City, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing work rules that provide that "Unauthorized release of employee or business information may result in disciplinary action up to and including discharge," which prohibit all solicitation "in work areas" and all distribution of "printed or written literature at any time in the facility, even when you are off-duty," or which classify "facility" information as confidential.

(b) Coercively interrogating employees about their suspected union activity and concerted activity for mutual aid or protection; threatening to have employees' nursing licenses revoked and asking for employee resignations because they have engaged in suspected union or concerted activity for mutual aid or protection; and directing or instructing employees to discuss employment problems with no one other than its administrator.

(c) Discharging, or otherwise interfering with, restraining, or coercing Christine Ellen Ryan, or any other employee, for nonflagrant and non egregious conduct provoked by unlawful statements concerning suspected union activity or concerted activity for mutual aid or protection of employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from the Employee Handbook that portion of the "Confidentiality" rule that states, "Unauthorized release of employee or business information may result in disciplinary action up to and including discharge," and those portions of the "Sales and Solicitation" rule that prohibit all solicitation "in work areas" and that prohibit distribution of "literature at any time in the facility, even when you are off-duty," and distribute to all employees copies of the Employee Handbook with those rules revised.

(b) Notify all employees, in writing, that the HANDBOOK FOR NON-MANAGERIAL STAFF is no longer effective and has been superseded by the Employee Handbook or, alternatively, remove from its

"Resident and Facility Confidentiality" rule the word "facility" and distribute to all employees copies of the HANDBOOK FOR NON-MANAGERIAL STAFF with the rule so revised.

(c) Within 14 days from the date of this Order, offer Christine Ellen Ryan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Christine Ellen Ryan whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Sioux City, Iowa nursing home copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 6, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain, or enforce, rules that provide that "Unauthorized release of employee or business information may result in disciplinary action up to and including discharge," which prohibit all solicitation "in work areas" and all distribution of "printed or written literature at any time in the facility, even when you are off-duty," or that classify "facility" information as confidential.

WE WILL NOT coercively interrogate you about your suspected union activity, nor about concerted activity in which you engage for the mutual aid or protection of yourselves and your coworkers.

WE WILL NOT threaten to have your nursing licenses revoked because you are suspected of engaging in union activity, or because you engage in concerted activity for the mutual aid or protection of yourselves and your coworkers.

WE WILL NOT ask for your resignation because you are suspected of engaging in union activity, or because you engage in concerted activity for the mutual aid or protection of yourselves and your coworkers.

WE WILL NOT direct or instruct you to discuss employment problems with no one other than our administrator.

WE WILL NOT discharge, or otherwise interfere with, restrain, or coerce Christine Ellen Ryan, or any other employee, for nonflagrant and nonnegligious conduct provoked by our unlawful statements concerning suspected union activity or concerted activity for mutual aid or protection of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our Employee Handbook the portion of the "Confidentiality" rule that states, "Unauthorized release of employee or business information may result in disciplinary action up to and including

discharge," and those portions of the "Sales and Solicitation" rule that prohibit all solicitation "in work areas" and that prohibit distribution of "literature at any time in the facility, even when you are off-duty," and WE WILL distribute to each of you copies of the Employee Handbook with those rules revised.

WE WILL notify you in writing that the HANDBOOK FOR NON-MANAGERIAL STAFF is no longer effective and has been superseded by the Employee Handbook or, alternatively, WE WILL remove from our "Resident and Facility Confidentiality" rule the word "facility" and distribute to each of you copies of the HANDBOOK FOR NON-MANAGERIAL STAFF with that revision.

WE WILL, within 14 days from the date of the Board's Order, offer Christine Ellen Ryan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Christine Ellen Ryan whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Christine Ellen Ryan and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CARE INITIATIVES, INC., D/B/A INDIAN
HILLS CARE CENTER

Polly Misra, Esq., for the General Counsel.

James C. Hanks (Klass, Hanks, Stoos, Stoik, Muqan & Villone), of Sioux City, Iowa, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Sioux City, Iowa, on July 25, 1995.¹ On April 14, the Regional Director for Region 18 of the National Labor Relations Board (Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on February 6, and amended on April 5 and on July 14, alleging violations of Section 8(a)(1) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

¹ Unless stated otherwise, all dates occurred during 1995.

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

There are essentially two aspects to this case. The first involves rules contained in handbooks distributed to employees. The General Counsel alleges that those rules violated Section 8(a)(1) of the Act because each is so broadly worded that it could be read by employees to prohibit them from engaging in activities protected by Section 7 of the Act. The second aspect involves certain statements made to Registered Nurse Christine Ellen Ryan on January 27, and her discharge on that same date. Each of those statements and Ryan's discharge is alleged to have violated Section 8(a)(1) of the Act.

B. The Handbook Rules

Care Initiatives, Inc. operates a number of facilities. One is Care Initiatives, Inc. d/b/a Indian Hills Care Center (Respondent), located in Sioux City. It is a nursing home. More specifically, Respondent is an intermediate care facility (ICF), which also has a skilled unit and a specialized Alzheimers' unit.²

The parties stipulated that in effect from about January 1990 to about January 1994 there had been a "HANDBOOK FOR NON-MANAGERIAL STAFF," which was distributed to at least some employees at Respondent's Sioux City facility. The "Resident and Facility Confidentiality" rule on page 16 states:

All staff have a responsibility to keep facility and resident information confidential. Deliberate disclosure of confidential information may be interpreted as an invasion of privacy and can result in civil liability and/or criminal prosecution.

The parties further stipulate that in effect from about January 1994 onward has been an "Employee Handbook," which has been distributed to at least some employees at Respondent's Sioux City nursing home. On pages 13 and 14 appears a rule pertaining to "Confidentiality":

Resident Information

By law, residents are guaranteed confidentiality of information about them. This means that no resident information is to be given to anyone without prior written approval from the resident or responsible party. We all must be careful not to talk about residents to others who have no legal right to that information, and only certain administrative employees are authorized to solicit written consent necessary to release information from residents' records. Violation of this policy is considered a violation of residents rights and you will be subject to disciplinary action up to and including discharge.

² It is admitted that, at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, based on the admitted facts that in the course and conduct of the above-described operations during 1994, Respondent derived gross revenues in excess of \$100,000 and, during that same year, purchase goods valued in excess of \$50,000, which were received at its Sioux City facility directly from points outside of the State of Iowa.

Employee or company business information

Employees also have a legal right to confidentiality regarding information about their employment, therefore employment files are only available to the individual employee and supervisory or management staff with a legal right to know that information. Certain business information such as financial reports are also considered confidential. Unauthorized release of employee or business information may result in disciplinary action up to and including discharge.

On page 17 of the Employee Handbook appears the following rule concerning "Sales and Solicitation":

Solicitation or sales between staff, between staff and residents, or by non-employees is prohibited on facility property. You are not permitted to distribute or post any printed or written literature at any time in the facility, even when you are off-duty. You are not allowed to solicit employees for participation in non-work activities on work time or in work areas. Any employee who violates this policy may be subject to disciplinary action up to and including discharge.

Obviously, Respondent intended the Employee Handbook to replace the earlier one for nonmanagement staff. There is no basis in the record for concluding, however, that it had communicated that fact to all employees working at Sioux City. Indeed, there is no basis for concluding that all of Respondent's employees there had received a copy of the 1994 Employee Handbook. For, Ryan denied that she had ever received a copy of the Employee Handbook. And review of her personnel file disclosed documents showing that she had signed for receipt of the 1990 handbook, as well as for receipt of a handbook that preceded the 1990 one. There was no similar document, however, signed by her for receipt of the 1994 Employee Handbook.

Inasmuch as there is no evidence showing that all Sioux City employees had been told that the Employee Handbook had superseded the rules in the HANDBOOK FOR NON-MANAGERIAL STAFF and, further, since no evidence exists that every Sioux City employee had been issued a copy of the Employee Handbook, there is no basis for concluding that all Respondent's employees had been aware during 1994 and 1995 that the rules of the HANDBOOK FOR NON-MANAGERIAL STAFF were no longer in effect during those later years and, more particularly, that their conduct was no longer subject to the Resident and Facility Confidentiality Rule set forth on page 16 of it.

C. Events of January 27, 1995

As of January 27, Respondent employed approximately 150 individuals at the Sioux City facility. Employees working there were not represented. An understanding of what occurred on that date requires some explanation of certain events occurring before then.

Prior to 1995, employees worked a schedule that allowed them to be off work every other weekend. Moreover, each shift was 8 hours in length, with an unpaid half hour for lunch. Thus, for example, the day shift started at 6 a.m. and ended at 2:30 p.m.

Prior to Monday, January 9, Respondent's administrator had been Rod Hirsch. On that date Timothy D. Hagerty became Respondent's administrator.³

He testified that Respondent had lost \$330,000 during 1994. In the face of a loss of that magnitude, he had been instructed to put some structure in place and to watch the labor hours and try to at least break even. To accomplish that, he pursued several courses.

First, he ascertained that there was a problem being able to recruit a sufficient number of certified nurse aides (CNAs) and, in addition, that there was no structure in the pay system. For example, some certified medical aides (CMAs) were receiving as much as licensed practical nurses (LPNs). So, he set out "to effect a range of pay rates for all positions." To attract applicants for CNA positions, he decided to increase salaries for them. He also decided to reduce wage rates for some CMAs. Those decisions had been made "pretty quick," Hagerty testified, and "we were just in the process of notifying them that week of the 22nd, 23rd" of January.

Another corrective course involved reducing the workday for CNAs, from 8 hours to 7-1/2 hours. Hagerty testified that, prior to January 27, "I didn't get a chance to really" advise those employees that their hours were going to be reduced, although he did not explain why he had not done so given his testimony that he had been "notifying them that week of the 22nd, 23rd" about their wage increases. In any event, Director of Nursing Mary Oberhelman⁴ testified that by the morning of Friday, January 27, there had been "employees that got the letter" notifying them "that their hours had been cut." And Hagerty agreed that "There was a letter that went with their paycheck on Friday talking about the seven and a half hours[.]"

By that date, a third change had been discussed, but had not by then been implemented. It was to change all employees' work schedules to 4 days on and 2 days off work. Obviously, the natural effect of doing so would be to change the above-described practice of allowing employees to be off work every other weekend.

Before the 6 a.m. shift began on January 27, some employees began discussing among themselves the wage reductions of some, the reduced daily worktime for CNAs, and the possibility of a change to a 4 on, 2 off workday schedule. Eventually, a group of them decided to go speak with Hagerty at 10 a.m. that morning. Among that group was Ryan.

She had first become employed by Respondent on August 11, 1989, as a graduate practical nurse. That is the classification for nurses who have graduated, but not yet received their board results. Once she received favorable results, her employment status was changed to that of LPN. She continued taking classes and, following graduation, became a reg-

istered nurse (RN) in July 1994. In that connection, Respondent had paid the cost of her classes for the last 2 years of Ryan's RN education.

During the time that she worked for Respondent, Ryan had never been disciplined. To the contrary, she regularly received pay raises. As a result, after having started work for it at a rate of \$7 or \$7.50 per hour, she was receiving \$12.22 an hour by January 27.

Though Ryan accompanied the group to Hagerty's office at 10 a.m. on January 27, she was not a leader of the group and did nothing to distinguish herself from the other employees who went there. That had not been the normal time for her morning break. It is uncontradicted, however, that she had skipped her break that morning and had ensured that there would be coverage for the residents while she attended the group meeting with Hagerty.

When the employees arrived at Hagerty's office, he decided that there were too many of them for so small an area. So, he directed them to go to the larger conference room. There, he told those who were not on break to return to work and said that he was willing to meet with them as individuals, but not as a group. Some of the employees protested that they wanted to meet with him "as a group," but he said that he preferred to do so "one at a time[.]" Thereafter, Hagerty did two things affecting those employees.

First, he was able to ascertain that employees were upset about the CNA workday reduction of a half-hour. So, he testified, "the decision was made just let's just forget it. It's not worth it." Between 11:15 and 11:30 a.m., the two directors of nursing—Oberhelman and Charissa Hines— assembled employees who were working and informed them that there would be no change in the 8-hour workday for the time being. At least one employee, but not Ryan, protested about relatively long-term employees having to suffer a pay cut.

Hagerty's second step that day was to ask Hines, who had been present in the conference room while the employee group had been there, to prepare a list of employees who she had seen there. Thirteen names were listed by her. Once he received the list, Hagerty began meeting separately with as many of those employees as he could that day. "Primarily to find out what they wanted to meet [about] that morning in the conference room. Give them a chance to talk to me."

Hagerty claimed that Oberhelman had been present when he met with each employee on the list prepared by Hines. But, Oberhelman contradicted that testimony: "I'll think I was only in there for about three of them." She identified those three employees as Ruby Hoxsie, Denise Saltzgeber, and Ryan.

Asked about the purpose for her attendance at those meetings between Hagerty and individual employees, Oberhelman testified,

We make it a policy to have any meetings that we hold with at least two people there. It gives a wider—like my purpose there I had a longer history at [Respondent] than Mr. Hagerty did and perhaps there would be questions that came up that he wasn't aware of at this time. It's just a general practice that no matter what you do you have a couple people there.

Still, if—as she claimed—Oberhelman had not been present for all of Hagerty's meetings with individual employees on

³ Respondent admits that at all material times since that date, Hagerty had been a statutory supervisor and its agent within the meaning of the Act.

⁴ Oberhelman had been hired by Respondent on September 8, 1992. She worked as a charge nurse on the evening shift and as the relief person for the p.m. supervisor until January 19, 1995. On that date, as a result of a selection made by Hagerty, she became Respondent's director of nursing. Respondent admits that, at all material times, Oberhelman had been a statutory supervisor and its agent within the meaning of the Act.

January 27, Respondent adduced no evidence regarding the identity of the second person who had been present during his meetings with employees other than Hoxsie, Saltzgiver, and Ryan that day. More significantly, it advanced no explanation as to why Oberhelman had been present, as the second person, during only the meetings conducted with those three employees.

Ryan was the ninth employee on the list with whom Hagerty met that day. She had clocked out and was waiting for Melinda Pry, who was participating in her meeting with Hagerty at the time. As she waited, Office Manager Jan Hiserotte told Ryan that Hagerty wanted to meet with her. After Pry left Hagerty's office, Ryan entered. Already there was Oberhelman, in addition to Hagerty. It is undisputed that, after Ryan entered, Oberhelman closed the door and said, "Chris Ryan." Hagerty checked her name off the list. From the accounts given by those three witnesses, the sequence of conversation appears to have been as follows.

Hagerty said that he had not gotten to talk with the group that morning, but would like to meet and visit with Ryan now. According to Oberhelman, he asked, "if [Ryan] had any concerns or problems that she wanted to discuss with him," but Ryan responded, "No, not really. We were advised to meet with you in a group." That remark sparked an exchange which forms the basis for alleged unlawful interrogation by Hagerty.

Ryan testified that Hagerty asked, "[W]ho told you to meet with me as a group?" When she replied, "Someone from outside the facility," testified Ryan, Hagerty demanded, "Who is it? I want to know who told you that," but she answered, "I do not have to answer that question."

As to that exchange, Oberhelman testified that Hagerty had asked, "Who advised you?" And Ryan responded, "I don't have to tell you." Oberhelman testified that she did not recall Hagerty saying anything more about the issue, nor his having asked Ryan anything more about it. But, Hagerty gave testimony that corresponded more closely to that of Ryan:

I said "Who instructed you" and she said "Well, nobody from inside. Somebody from the outside." And I said, "Well, who from the outside are you talking about" because I had no idea what she was talking about.

According to Hagerty, Ryan answered, "I'm not going to tell you."

After that exchange, testified Ryan, Oberhelman interrupted, asking if Ryan was not aware that she was a supervisor of aides and that Oberhelman "could take your nursing license for starting unions or whatever you are trying to start." According to Ryan, when she denied knowing anything about unions and trying to start anything, Oberhelman said that she also could take Ryan's nursing license for having residents unattended earlier that day when Ryan had gone to Hagerty's office with the employee group. Ryan testified that she replied that there had been staff left behind to take care of the residents, in the same fashion as ordinarily was done whenever inservice meetings were conducted. The General Counsel alleges that Oberhelman's remarks constituted threats that violated Section 8(a)(1) of the Act.

Oberhelman denied that she had threatened to take Ryan's "license because you are starting a union or whatever you are trying to start" and having threatened to do so because Ryan had left residents unattended. She pointed out that, as director of nursing, she has no power to take a nursing license—that power rests exclusively with the Iowa Board of Nursing. In consequence, she testified that he was confident that she had not made those threats, because, "I don't have the power to do it. I don't make statements that I can't back up."

Hagerty was not similarly confident about Oberhelman's statements to Ryan. He testified initially, "I just remember Mary saying something about [Ryan] being part of management," but later testified, "I honestly don't remember whether Oberhelman made a statement to the effect that she could take away Chris Ryan's nursing license in that conversation[.]" In that connection, Hagerty testified, "Mary and her talked and I was perplexed. I didn't have a clue to what—who from the outside she was talking about. She really—she really got me on that one. I had no idea who she was talking about and she and Mary were visiting."

Hagerty appeared to be advancing perplexity as the reason for not having paid particular attention to the words Oberhelman had been speaking to Ryan during the meeting. Still, he obviously had been aware of Oberhelman's words to Ryan. For, Hagerty attempted to explain what Oberhelman had meant by those remarks.

He testified, "I think Mary's concern after the statement [about 'somebody from the outside'] was made confidentially. What was being leaked to the outside was confidential and I think she was concerned about Chris and her involvement with it." During cross-examination, Hagerty repeated that explanation: "I didn't know what outsider she was talking about and in the nursing home business there is a lot of confidential information that takes place in that home and there should be a concern about confidentiality," regarding such matters as, "Patient care, patient records, treatment plans. Those types of things." Given the importance of such a subject, if Hagerty had listened sufficiently to Oberhelman's remarks to supposedly understand the purported reason for her statements to Ryan, then it is difficult to conclude that he would not have heard Oberhelman mentioning "starting unions or whatever you are trying to start." Indeed, Oberhelman never denied having made that particular remark to Ryan.

Obviously, Hagerty was speculating about the concern that had motivated Oberhelman to speak to Ryan during the January 27 meeting. He never testified that she had told him what concern had led her to make those statements to Ryan. In fact, when she was questioned about her concern for having done so, she dispelled any inference that her statements had been motivated by concern about possible breach of confidentiality:

A. I read a lot of journals and newspapers and this was in them all. That's why it popped out of my mouth—

Q. Okay.

A. —in a concern for Ms. Ryan. There is a law that is in reference to nurses who are supervisors are unable to belong to a union and I wanted—just wanted her to be aware to that—

Q. Okay.

A. —in that she did supervise certified nursing assistants and medication aides.

Thus, Oberhelman testified that “all I said” to Ryan that afternoon was, “Are you aware that there is a new law that makes it illegal for a nurse with supervisory capacity to belong to a union? . . . You are considered a supervisor because you are over—over the aides in the building.”

Following the exchange with Oberhelman, testified Ryan, Hagerty asked if she liked her job at Respondent, she replied that she did “very much,” he referred to her as “Tami” and, when she corrected him—“No, my name is Chris”—Hagerty “kind of sat back in the chair and rolled his eyes back and said, ‘Well, I can see by looking at you that I’m not going to get anywhere today.’” Then, Ryan testified, Hagerty said, “I will take your resignation now or any time you want to give it.” When she did not answer, testified Ryan, Hagerty added, “If you ever have a problem about anything in this facility you are never to go outside this facility to ask a question. You are to come to me and to me only and do you understand that?” The General Counsel alleges that both remarks by Hagerty violated Section 8(a)(1) of the Act.

At that point, Ryan acknowledged that she stood up, called Hagerty a son-of-a-bitch, opened the office door, and walked out of the office. Hagerty and Oberhelman each testified that Ryan had called Hagerty both “a dirty bastard and a son of a bitch.” Oberhelman testified that when she did so, Ryan had been “very loud, angry, and she was right in his face yelling at him.” In fact, both Hagerty and Oberhelman testified that Ryan had appeared angry when the latter had entered the office that day. And, testified Oberhelman, Ryan had continued to appear that same way throughout the January 27 meeting. When questioned about Hagerty’s remarks leading to Ryan’s final statement during that meeting, however, the two management officials became less specific.

Both acknowledged that Hagerty had asked if Ryan liked her job. Oberhelman testified that Ryan “said yes, she enjoyed working there.” Asked why he had chosen to ask such a question, Hagerty testified, “She seemed terribly unhappy and I just asked her, you know, if she was happy with her job or something like that.” Given his asserted concern that led him to ask that question, presumably Hagerty would have been attentive to Ryan’s response to it. Yet, when asked what Ryan had answered, Hagerty testified with less certainty than did Oberhelman: “I think she said she liked her job.”

Hagerty displayed even greater uncertainty when questioned about whether he had made a statement regarding Ryan’s resignation: “I don’t remember saying that specifically, no.” Similarly, Oberhelman testified, “No, I don’t” remember Hagerty having said anything to Ryan about her resignation. Two aspects of that lack of recollection testimony should not pass without notice at this point.

First, a mere expression of inability to recall having made a particular statement hardly qualifies as a clear denial or refutation of having made it. Instead, inability to recall inherently leaves the record in the posture that it is as likely that the witness had made the statement, attributed to him/her, as it is likely that the witness had not made it. In effect, such an answer leaves the trier of fact to infer a denial that the

witness was unwilling to voice. That would not be a proper inference. For, lack of recollection answer “hardly qualifies as a refutation of . . . positive testimony and unquestionably was not enough to create an issue of fact between” Ryan, on the one hand, and Hagerty and Oberhelman, on the other. *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 425 (4th Cir. 1981).

Second, Hagerty’s “don’t remember that specifically” answer says something about his general candor. Asking for an employee’s resignation is hardly an ordinary occurrence. By January 27 Hagerty had been relatively new to the position of Respondent’s administrator. He appeared when testifying to be a reasonably perceptive individual. In the totality of those circumstances, it seems that he likely would have remembered whether or not he had asked an employee for her resignation. There should have been no equivocation about such a remark to Ryan. The fact that Hagerty—and Oberhelman, as well—chose to equivocate, by claiming lack of recollection about whether he had made it, seemed to result from an effort to avoid having to explain why such a statement would have been made to an employee, than from a genuine lack of recollection about whether such a relatively significant statement had been made to Ryan.

Oberhelman also appeared to be equivocating concerning the statement, attributed to Hagerty, that Ryan should never “go outside this facility” with problems involving the facility. “I never said that,” testified Hagerty. But, asked if she remembered Hagerty having said to Ryan anything about never going to anyone outside of the facility, but to come only to him with a problem, Oberhelman answered, “No, I don’t.”

It should not pass without notice that had Hagerty not actually directed Ryan not to take facility-related problems to outsiders then her accusation that Hagerty was an s.o.b. would have been made in response to his not actually disputed statement that he would “take your resignation now or any time you want to give it.” Such a remark is hardly non-provocative to an employee who hears it.

Initially, Hagerty testified that he had said nothing after Ryan called him a dirty bastard and an s.o.b.:

A. She got out of her chair, basically leaned over my desk and called me a dirty bastard and a son of a bitch and then she went out the door and slammed the door.

Q. Okay. Before she got out the door did you make any comments to her after being called dirty bastard and a son of a bitch?

A. I was startled. I—no, I didn’t.

Q. About how long did this whole conversation last then?

A. It didn’t last very long. She couldn’t have been there but two, three, four minutes. It just— she just wasn’t there long enough.

Q. What did you do after Chris slammed the door and left?

A. I kind of looked at Mary and just—I didn’t know what was going on. I honest to God was startled and I got up and opened the door and I went down the hall after her, and she had hung a left toward the back of the building.

Later in his testimony, Hagerty would alter that account.

Asked specifically if, "At any point in time," he had said anything to Ryan about her employment status, Hagerty contradicted his above-quoted testimony, then testifying: "I told her in my office that she was terminated. After she called me those names that was automatic. I terminated her on the spot." He testified, at that point, that he had said to Ryan: "You are terminated." Oberhelman, who testified after Hagerty, but had been present while he testified, confirmed Hagerty's second account:

Q. Mr. Hagerty then testified about any statements he made to her at that point. What do you recall, if anything?

A. He said, "You are terminated. No one speaks to—nobody speaks like that."

Q. What did she do? Did she say anything?

A. She said nothing. She turned abruptly, went out, slammed the door. The walls shook and she was gone.

Although she admitted having called Hagerty an s.o.b., Ryan denied specifically having called him "a dirty bastard" on January 27. Asked if she ever had called any other management representative an s.o.b., Ryan testified that she never had done so and, further, that it was not a term that she used frequently in her employment. "I would have to be extremely upset," she testified, to use that term. She further testified that on January 27 she had been extremely upset about what was being said to her during the meeting in the administrator's office.

Consistent with Hagerty's first above-quoted testimony, Ryan testified that Hagerty had said nothing between the time that she had called him an s.o.b. and the time that she had left his office: "If he would have said [anything] I would have remembered it." She testified that, after leaving the office, she had taken a course through the facility which would lead to the exit nearest to where her car was parked outside the building. As she walked down the hall, she testified, Hagerty came out of his office and "yelled" after her, "You get back here. You get the hell back here right now," but she kept walking until she reached the double doors going into the laundry room.

As she was passing through those doors, Ryan testified, Hagerty had overtaken her and said, "You get your ass out of here" or "out of my facility[.]" She also testified that he told her to "stay out" of "here" or of "my facility." "I have vacation time coming," Ryan testified that she told Hagerty, and he said, "We'll just see about that." At which point, she acknowledged, she again called him an s.o.b. and resumed walking out of the facility.

Oberhelman agreed with Ryan in that, after "three, four seconds," Hagerty had left his office in pursuit of Ryan. However, she testified that she did not "recall hearing" Hagerty say anything to Ryan nor, specifically, recall hearing him say, "Get the hell back here. Get the hell back here now." Similarly, Hagerty testified that he did not recall having made those statements to Ryan.

Hagerty admitted that he did follow Ryan down the hall. However, he testified, "I don't remember that" when asked if he had told Ryan, "You get your ass out of my facility and you stay out." He did testify that, "She turned around when she got to the double doors leading to the laundry room and she said, 'Get the f—k away from me,'" and that

he had replied, "Fine. That's as far as I'm going." Asked whether Ryan had mentioned her vacation pay, Hagerty testified, "I don't remember an thing about that being said." Ryan denied specifically that she had said words to the effect of "get the f—k away."

II. DISCUSSION

"Because [of] the language she used to me," and, "Because of the names she called me," testified Hagerty, had been the only reason that Respondent discharged Ryan. So far as it goes, that testimony appears to have been accurate—Ryan's name calling had been the hook of a reason on which Hagerty chose to hang his decision to discharge Ryan.

"Neither this Act nor any other federal labor law protects an employee from insubordinate conduct or calling a supervisor an s.o.b." *Foodtown Supermarkets*, 268 NLRB 630, 631 (1984). Indeed, there is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy. See, *NLRB v. Washington Alluminum Co.*, 310 U.S. 9, 17 (1962). "However, egregious or flagrant conduct by an employee may justify discharge of that employee even though the conduct occurred in the course of otherwise protected activity." (Citation omitted.) *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288 (10th Cir. 1980). "To be sure . . . otherwise protected employee conduct may be so extreme as to lose the protection of the Act; and in such a case discharge or discipline by the employer for that conduct is lawful." *Brunswick Food & Drug*, 284 NLRB 663, 664 (1987), *enfd. mem.* 859 F.2d 927 (11th Cir. 1988).

Among the specific types of conduct that could exceed the protection of the Act are vulgar, profane, and obscene language directed at a supervisor or employer, even though uttered in the course of protected concerted activity. See, e.g., *NLRB v. Apico Inns of California, Inc.*, 512 F.2d 1171 (9th Cir. 1975); *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972). That is, "communications occurring during the course of otherwise protected activity remain likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.'" *Dreis & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) (quoting from *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946)). More specifically, in the context of the instant case, "insulting, obscene personal attacks [by an employee against a supervisor] need not be tolerated[.]" *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985).

Nonetheless, care must be exercised in evaluating employee language uttered in the course of engaging in activity protected by Section 7 of the Act. For, "vigorous exercise of [Section 7 rights] must not be stifled by the threat of liability for the over enthusiastic use of rhetoric." *Old Dominion Branch No. 496, National Alliance of Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974). "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior that must be balance against the employer's right to maintain order and respect." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). "Thus, the Board has long held that the use of strong language in the course of protected activities supplies no legal justification for disciplining an employee except in those circumstances where the conduct is flagrant or egregious. *Hawthorne Mazda, Inc.*, 251 NLRB 313, 316 (1980). Indeed, with re-

spect to the admitted remark made by Ryan, it has been held that calling an employer's president a "son-of-a-bitch" was not "so outrageous as to justify discharge." *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029-1030 (6th Cir. 1974), cert. denied 419 U.S. 828 (1975).

In this connection, one additional principle is important in the context of the instant case. "Several cases have analyzed employer discipline of employees for protected activity where the employee responded with intemperate language." (Citations omitted.) *NLRB v. Vought Corp.*, 788 F.2d 1378, 1384 (8th Cir. 1986). In that case, the court agreed with the holding that "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee." *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 978 (5th Cir. 1982). See *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993). "[T]he Board has long held that an employer cannot provoke an employee by its unlawful conduct to a point where he commits an indiscretion and then rely on it to discipline the employee." (Citation omitted.) *Spartan Equipment Co.*, 297 NLRB 19, 19 (1989). And, discharge is not "the only type of employer provocation which would warrant an allowance of some leeway for impulsive behavior." *Brunswick Food & Drug*, supra, 284 NLRB at fn. 6.

In the instant case, there can be no question that, while she had been the lone employee in Hagerty's office during the afternoon of January 27, Ryan had been engaged in activity which was both protected and concerted within the meaning of Section 7 of the Act. That meeting had occurred as a result of an effort earlier that day by employees to meet with Hagerty as a group. Only when he had refused to meet on that basis did those employees submit to his preference for individual meetings. Still, those individual meetings were the result of initial collective activity. That is, each meeting was a component of an overall effort to deal with Respondent on a group basis. Each one can no more be segregated from the group effort, and treated as an individual noncollective event, than could a single employee's statement to an employer during its group meeting with its employees. Accordingly, on January 27 Ryan had been engaged in concerted activity within the meaning of Section 7 of the Act.

The reason for the employees' group effort to meet with Respondent on January 27 had been their concern about wage reductions and schedule changes. Those are subjects encompassed by Section 8(d) of the Act—are "aspect[s] of the relationship between [an employer] and its employees." *Ford Motor v. NLRB*, 441 U.S. 488, 501 (1979).

Certainly, Ryan was not affected personally by the CMA wage reductions, nor by the reduction of CNAs' workday from 8 to 7-1/2 hours. Nonetheless, the Act contemplates that nonpersonally affected employees will sometimes join with those who are affected directly by employer conduct. By so doing, "each one assures himself, in case his turn ever comes, of the support of the one[s] whom they are all then helping; and the solidarity so established is 'mutual in the most literal sense.'" *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505-506 (1st Cir. 1942). Accord: *Kellogg Co. v. NLRB*, 457 F.2d 519, 523 (6th Cir. 1972).

In any event, Ryan did have a personal stake in the potential loss of being off every other weekend, should Respondent switch to a 4-day on, 2-day off work schedule. Each sin-

gle employee need not have a personal interest in every other employee's personal concerns to be a part of an overall protected effort by an employee group to discuss working conditions with their employer. Her personal interest in one of the subjects to be discussed with Respondent suffices to extend the Act's protection to her participation in the group's effort. Therefore, Ryan had been engaging in concerted protected activity, within the meaning of Section 7 of the Act, when she met with Hagerty and Oberhelman during the afternoon of January 27, as an extension of her effort to meet with Hagerty as part of an employee group.

During that meeting, the complaint alleges that Ryan had been unlawfully interrogated, threatened, and advised not to discuss work-related problems with anyone but Respondent's administrator. Respondent argues that the alleged interrogation had amounted to nothing more than Hagerty's natural curiosity as to what Ryan had meant by her admitted remark, "We were advised to meet with you in a group." In reality, that does appear to have been the remark which led to a shift in Hagerty's intended direction for the meeting—from discussion about whatever work-related problems Ryan might feel she was experiencing, to discussion of whomever she had conferred with and of the propriety of her doing so, from Respondent's perspective.

I credit Ryan's testimony that, after she made that remark, she had been questioned about who had given the advice to meet as a group with Hagerty, had been threatened with loss of her nursing license if she became involved with "starting unions or whatever you are trying to start," had been told that she could submit her resignation, and had been instructed to confer only with Hagerty about problems with Respondent and not to resort to outsiders. Ryan appeared to be attempting to testify candidly, in contrast to the attitudes displayed by Hagerty and Oberhelman. Each of those statements described by Ryan constitutes a violation of Section 8(a)(1) of the Act.

The meeting was conducted by Respondent's administrator, the highest ranking official of Respondent at the Sioux City facility. Present, also, was Oberhelman, Ryan's immediate supervisor. Though the employees had asked to meet with Respondent as a group, that request had been denied by Hagerty, leaving Ryan to meet alone—outside of the presence of other employees—with him and Oberhelman. The meeting had been conducted in the administrator's office. At no point was Ryan advised that she did not have to participate in that meeting. Nor was she advised that Respondent would not hold against her anything that she might say in response to Hagerty's statements. In sum, the very circumstances under which the meeting was conducted had been inherently coercive.

Had Hagerty only once asked who had advised Ryan, there might be some merit to Respondent's natural curiosity argument. However, after Ryan initially responded that it had been "Someone from outside of the facility," Hagerty persisted in questioning about the identity of that "Someone." Moreover, his statement, "I want to know who told you that," is reasonably interpreted more as a demand for information, than as a simple request bred by casual inquisitiveness.

By the time that he met with Ryan, Hagerty surely had to be aware that the group of employees were concerned about certain working conditions. It followed that he also had to

understand that it had been about those working conditions that employees had conferred with “Someone from outside of the facility.” Indeed, Oberhelman’s admitted immediately subsequent reference to “unions” is strong evidence that she and Hagerty suspected that the group of employees might have contacted a union concerning their working conditions.

There is no legitimate purpose for an employer to ask employees about whether they have been conferring with a union, in the circumstances presented here. Respondent had received no demand for recognition from any union. Beyond involvement with a union, neither is there a legitimate reason for an employer to inquire about whether, and to what extent, employees may be engaging in concerted activities for mutual aid and protection.

Respondent argues that its officials had a legitimate concern regarding whether confidential information might have been disclosed to outsiders. In the circumstances of this case, however, that is not a persuasive argument. During the January 27 meeting, neither Hagerty nor, more particularly, Oberhelman made any mention of confidential information. The only concerns expressed by the latter had been whether Ryan had been “starting unions or whatever you are trying to start,” and leaving residents unattended. Of course, Respondent has made no contention that the latter had occurred at 10 a.m. on January 27, nor has it presented evidence that would support such a contention. There is no objective basis disclosed by the record for either Hagerty or Oberhelman to have believed on January 27 that Ryan might have disclosed confidential information to anyone not employed or related to Respondent. Indeed, neither Hagerty nor Oberhelman pointed to any fact that reasonably could have led either one of them to believe that an employee with over 5 years service with Respondent—such as Ryan—would be disposed to suddenly begin disclosing patient information to outsiders.

Wage levels and work schedules cannot even arguably be categorized as patient information. It had been the concern about those employment subjects that led the employee group to attempt to meet with Hagerty during the morning of January 27. His later 20 individual meetings with members of that group obviously revealed the specifics of their employment-related concerns. For, he decided not to reduce the CNA workday to 7-1/2 hours. There is no evidence whatsoever that any of those employees that day had complained about any subject relating to patients, much less discussed information pertaining to patients that could be classified as confidential. Consequently, there was no basis for either Hagerty or Oberhelman to even suspect that Ryan’s communications with “outsiders” had involved patient-related concerns—had involved any subjects other than ones concerning working conditions. Certainly, Hagerty ceased demanding the identities of outsiders, from whom Ryan and other employees had obtained advice to meet with him as a group, when Ryan asserted that she did not need to reveal that information. Yet, any diminishing effect which that cessation might have, on the coerciveness of Hagerty’s interrogation, is dissipated by Oberhelman’s threat to take Ryan’s “nursing license for starting unions or whatever you are trying to start.” Two defenses are raised in connection with that statement. First, Oberhelman denied that she had made it, pointing out that she lacked the power to take a nurse’s license, and that only the State of Iowa had authority to do so. But, there is no evidence that those facts had been known by Ryan on January

27. That is, there is no evidence that Ryan had been aware that Respondent—which, after all, had paid for 2 years of her schooling needed to become an RN—could not revoke her nursing license.

Beyond that, state action to suspend or revoke a nursing license can be initiated by an employer’s report of purported nursing misconduct to an appropriate state agency, similar to what occurred in *Hacienda de Sal d-Espanola*, 317 NLRB 962, 966, 969 (1995). It is not uncommon for people to use, as it were a sort of verbal shorthand to threaten consequences that they personally cannot accomplish—“I’ll put you in jail” or “I’ll revoke your business license”—but that can result from action that those persons initiate: filing a criminal complaint or reporting asserted misconduct to a licensing agency. In sum, the fact that Oberhelman could not personally revoke Ryan’s nursing license, of itself, does not dictate a conclusion that she had not made such a threat to Ryan.

Second, Oberhelman claimed that her remarks to Ryan had constituted nothing other than a warning that supervisors could not engage in union activity. Yet, putting to the side the merit of such a position, Respondent has admitted the complaint’s allegation that “at all material times, Christine E. Ryan has been an employee of Respondent within the meaning of Section 2(3) of the Act.” Further, while Oberhelman testified that Ryan had been “over the aides in the building” and “did supervise certified nursing assistants and medication aides,” neither Oberhelman, nor Respondent, presented any evidence that Ryan ever had, “in the interest of” Respondent, exercised “the use of independent judgment” to perform any of the supervisory powers enumerated in Section 2(11) of the Act. Nor did Oberhelman make any particularized showing that she likely could have believed that Ryan had been doing so on and before January 27.

In fact, in his effort to explain Oberhelman’s remarks to Ryan on January 27, Hagerty made no mention whatsoever of any belief that Ryan might have been a statutory supervisor. Instead, he focused on the above-concluded specious possible-breach-of-confidentiality claim. Obviously, Oberhelman had asserted that day that Ryan was a supervisor; Ryan testified that Oberhelman had done so. Still, mere assertion does not establish something as fact. In the circumstances, that assertion appears to have been intended as nothing more than an added vehicle for deterring Ryan from “starting unions or whatever you are trying to start,” rather than assertion of genuinely held belief by Oberhelman that Ryan was, or might be, a statutory supervisor.

That conclusion finds further support in Oberhelman’s next accusation that day: that Ryan had left residents unattended to participate in the 10 a.m. group meeting with Hagerty. Ryan denied having done so. Respondent presented no evidence that, in fact, Ryan had abandoned residents to attend that meeting. Indeed, there is no evidence that Ryan’s arrangements for resident care at 10 a.m. on January 27 had differed in any respect from procedures that she followed whenever in-service meetings were conducted by Respondent, as Ryan pointed out to Oberhelman and Hagerty during the meeting. Nor, more particularly, is there any showing that resident care had been left any more unattended at 10 a.m. on January 27, than it had been approximately 1-1/2 hours later when Hines and Oberhelman, herself, had summoned all employees to an informal meeting to explain that

the 7-1/2 hour CNA workday announcement had been rescinded.

In sum, both the supervisory characterization and the unattended residents' accusation, by Oberhelman on January 27, were mere hollow assertions, apparently intended to fortify what Oberhelman now concedes to have been an equally hollow assertion that she could take Ryan's nursing license "for starting unions or whatever you are trying to start." That is, these remarks were all components of a overall effort to deter Ryan from engaging in statutorily protected activity with her coworkers for mutual aid or protection.

Another component of that effort was Hagerty's remark to Ryan, "I will take your resignation now or any time you want to give it." Viewed objectively, from an employee's standpoint, such a remark, following questioning about the identity of "outsiders" advising employees about work conditions and specific mention of "unions," conveys a natural meaning that an employee should resign or quit if she wanted to continue contacting "outsiders," in general, or unions, in particular, for mutual aid or protection of herself and her coworkers.

Inherent in such a resignation or quit statement is the suggestion that Respondent regarded activity protected by Section 7 of the Act, on the one hand, and continued employment with it, on the other, to be essentially incompatible. See *NLRB v. Crystal Tire Co.*, 410 F.2d 916, 918 (8th Cir. 1969). Thus, it "is essentially a thinly veiled threat to fire [Ryan] for [her statutorily protected] activities and is thus violative of the Act." (Citation omitted.) *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 276 (8th Cir. 1979).

Respondent argues that, by the resignation remark, Hagerty merely had been informing a seemingly unhappy employee "that he would accept her resignation" and "that if she was unhappy, she was free to leave." The problem with this argument is that it is not truly based on the evidence. In the first place, it was not an explanation actually advanced by Hagerty for his uncontested resignation remark. Indeed, it could not be so. For, he was unable to remember whether he had made the statement to Ryan.

Secondly, both Hagerty and Oberhelman agreed with the testimony by Ryan that, when asked, she had responded that she liked her job. That response obviously showed that Ryan was not disposed to leave employment with Respondent. Consequently, Respondent can find no solace in that "unhappy" employee argument.

Hagerty did deny having instructed Ryan "never to go outside this facility" with her problems, but "to come to me and to me only" with them. Yet, Oberhelman testified only that she did not remember Hagerty having made such statements. She never denied specifically that he had done so. Respondent argues that Ryan's testimony about such remarks is inherently incredible, since "there were eight other employees [who] were interviewed before Ryan. If Hagerty was concerned about controlling employee behavior . . . then he should have had the same message for the eight employees who preceded Ryan into his office." That does not follow, necessarily.

An employer's failure to interfere with, restrain, or coerce all employees does not disprove, of itself, testimony that unlawful statements had been made to one employee. See *Handicabs, Inc.*, 318 NLRB No. 63, slip op. JD at 9 (Aug. 31, 1995), and cases cited therein. Furthermore, while Ryan

mentioned employees having been advised to meet with Hagerty as a group, there is no evidence that any other employee had made such a statement to Hagerty during her/his separate meeting with the administrator on January 27. In fact, there is no evidence that any other employees had made mention whatsoever to Hagerty of consultation with an outsider.

Accordingly, there is no evidence of any similar predicate statement to Hagerty by any other employee, even similar to the one by Ryan that led to the ensuing discussion during her separate meeting, which eventuated in Hagerty's instruction that she was "never to go outside this facility" and, if she had problems, was "to come to [Hagerty] and to [him] only[.]" Clearly the "problems" to which Hagerty was referring were employment-related ones. There is no basis for an employee in Ryan's position to infer that Hagerty had been referring to any other category of problems. And the Act guarantees employees the right to confer with persons and entities, such as unions, other than their employer about employment related problems.

In light of the foregoing considerations, I conclude that Respondent violated Section 8(a)(1) of the Act by threatening loss of Ryan's nursing license, saying that she could submit her resignation, and prohibiting her from discussing employment-related problems with anyone other than Respondent's administrator. These unlawful statements were made during the same meeting that opened with questioning of Ryan about whom she had met when the employees were advised to meet with Hagerty as a group. Given the identity of the interrogator, the locus of that interrogation, the other unlawful statements to Ryan during that same conversation, the absence of evidence that Ryan had been some sort of open activist before her meeting with Hagerty and Oberhelman, the absence of any explanation to her of a legitimate purpose for Hagerty's repeated question, and the absence of any assurance to Ryan that she was free not to answer Hagerty's questions and would suffer no reprisals as a result of her answers, I conclude that Respondent coercively interrogated Ryan on January 27.

All of the foregoing unlawful statements were part of the conversation which culminated when Ryan accused Hagerty of being an s.o.b. Consistent with my general observation that neither Hagerty nor Oberhelman was testifying candidly, I do not credit their testimony that Ryan had directed other profane statements to Hagerty. She denied having done so, and their accounts of other profane remarks, like their testimonies in general, appeared to have been intended as a means of fortifying Respondent's defense, instead of being an effort to describe accurately events and statements on January 27.

The first time that Ryan used the term s.o.b. had been in immediate response to Hagerty's unlawful direction that she not confer with anyone other than him about employment problems. The second occasion occurred after he had fired her. Obviously, as discussed above, employees are not licensed by the Act to call their employers names. Still, as also discussed above, an employee's intemperate language will not automatically strip that employee of the Act's protection in situations where, in the course of statutorily protected activity, the employer unlawfully provokes that employee.

Ryan was an unrepresented employee who had been summoned by herself to Hagerty's office and, in consequence, had been effectively compelled "to speak for [herself] as best [she] could." *NLRB v. Washington Aluminum Co.*, supra, 370 U.S. at 14. The discussion there was effectively an extension of an employee group's effort to meet collectively with Hagerty to discuss certain employment conditions. Accordingly, Ryan was engaging in activity protected by the Act and "not every impropriety committed during such activity places the employee beyond the protective shield of the [A]ct." *NLRB v. Thor Power Tool Co.*, supra. "The leeway is greater when the employee's behavior takes place in response to the employer's wrongful provocation." *Trustees of Boston University v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977). See also *NLRB v. Vought Corp.* supra, and *Wilson Trophy Co. v. NLRB*, supra.

Ryan first called Hagerty an s.o.b. at the end of a conversation during which she had been coercively interrogated about the identity of whomever had advised Respondent's employees to meet with Hagerty as a group, she had been threatened with loss of her "nursing license for starting unions or whatever you are trying to start," and she had been asked for her resignation because, in effect, her protected concerted activity was inconsistent with continued employment by Respondent. These statements had been the immediate background for Hagerty's direction that Ryan was not to confer with anyone other than himself regarding employment concerns. That instruction, if followed, deprived Ryan of ability to confer with, and obtain advice from, other persons about her employment problems. Indeed, Hagerty's "to me only" statement was so broad that it encompassed other employees, thereby precluding Ryan from engaging in any concerted activity with her coworkers. In sum, there had been considerable provocation by unlawful statements that led her to accuse Hagerty of being an s.o.b.

Even if Ryan had entered Hagerty's office on January 27 appearing angry and hostile—testimony which I do not credit—there is no evidence that she had planned to call Hagerty names. She had never directed the term s.o.b. to any other management representative. However, she testified that she had become extremely upset at what was being said to her by Hagerty and Oberhelman. In light of the unlawfulness of their statements to Ryan, there was ample objective basis for her reaction. Moreover, while her remark had been unpleasant for Hagerty to hear, he brought it on himself by his own statements, as well as by the statements of the director of nursing whom he had selected, which "gave rise to the antagonistic environment in which [her] remark[] [was] made." *NLRB v. Mueller Brass Co.*, 501 F.2d 680, 686 (5th Cir. 1974).

Nor can it be said that Ryan's repetition of that term to Hagerty, at the double doors to the laundry, deprived her of the Act's protection. Before she repeated it, Hagerty had followed her from his office, had told her to "Get your ass out" and "stay out," and had questioned whether she would receive her vacation pay. This sequence of events had been, in essence, an extension of what had occurred in Hagerty's office—that is, a continuation of the conversation about employment conditions, and the unlawful remarks to Ryan, that had taken place there. Consequently, her repeated statement is governed by the same principles as the initial use of the term, with the same result.

Therefore, Ryan initially called Hagerty an s.o.b. in reaction to unlawful remarks made to her. Given that provocation, her initial single impulsive impropriety did not strip the Act's protection from the underlying activity of trying to concertedly discuss working conditions with her employer—did not constitute conduct "so violent or of such serious character as to render [Ryan] unfit for further service." *NLRB v. Illinois Tool Works*, supra. By terminating Ryan for having done so—whether in his office or in the hallway—Hagerty violated the Act and, in the process, enlarged on Respondent's provocative unlawful conduct. As a result, neither did her repetition of the term s.o.b. serve to strip the Act's protection from her underlying protected concerted activity. Therefore, I conclude that by discharging Ryan, Respondent also violated 8(a)(1) of the Act and, further, that Ryan is entitled to an offer of reinstatement as part of the remedy for that unfair labor practice.

With respect to the handbook rules, Section 7 of the Act guarantees employees the rights "to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . other mutual aid or protection." "Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542–543 (1972). Obviously, the statutory right "to form, join, or assist labor organizations" contemplates employee communication with "outsiders"—with persons not employed by the particular group of employees' employer. Further, employees do not "lose their protection under the 'mutual aid or protection' clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987).

Under those basic principles the General Counsel challenges the final sentence of the "Employee or company business information" portion of the Employee Handbook's "Confidentiality" rule: "Unauthorized release of employee or business information may result in disciplinary action up to and including discharge." On its face, so broad a proscription could reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment, including wages, which could fall under the broad categories of employee or business information. *Pontiac Osteopathic Hospital*, 284 NLRB 442, 466 (1987).

That conclusion is not diminished by an argument that the above-quoted disciplinary warning must be read in the overall context of the rule of which it is the final sentence. At best, mention of "employment files" and of "financial reports" serves only to provide examples of what turns out to be a more broadly worded prohibition. Had that prohibition been confined only to "employment files" and "financial reports," the disciplinary warning should have so stated, to avoid the need for employees to puzzle out for themselves whether disclosures of other types of "employee or business information" might subject them to "disciplinary action up to and including discharge."

In addition, the General Counsel challenges the Employee Handbook's "Sales and Solicitation" rule, also quoted in section I.B. That rule prohibits employees from distributing "printed or written literature at anytime in the facility, even

when you are off-duty.” It also prohibits employees from soliciting “for participation in non-work activities . . . in work areas.” Both rules are unlawful.

“The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.” *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). To be sure, employers are permitted under the Act “to promulgate and enforce a rule prohibiting . . . solicitation during working hours.” (Citation omitted.) *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249 (5th Cir. 1992), cert. denied 113 S.Ct. 492 (1993). Beyond that, however, “[n]o restrictions may be placed on the employees’ right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

Respondent has made no slowing of need “to maintain production or discipline” by broadly prohibiting employees from engaging in solicitation “in work areas,” nor by prohibiting distribution of “literature at any time in the facility, even when you are off-duty.” Absent such a showing, a prohibition on solicitation in work areas, so broadly worded that it encompasses employees’ nonworktime, includes a proscription of statutorily protected activity. See *Brunswick Corp.*, 282 NLRB 794, 797, 798 (1987). Respondent’s rule treats “work areas” as a category separate from “worktime.” As a result, the rule ends up so broadly worded that it unlawfully prohibits nonworktime solicitation “in work areas,” without regard to maintenance of production or discipline.

The prohibition on distribution of literature extends to “any time in the facility, even when you are off-duty.” “The distribution of literature by employees in an employer’s facility during nonworking times and in nonworking areas constitutes protected concerted activity provided the literature . . . falls within the scope of the ‘mutual aid or protection’ clause of Section 7 of the Act.” (Fn. omitted.) *Trover Clinic*, 280 NLRB 6, 6 (1986). See discussion, *Nashville Plastic Products*, 313 NLRB 462, 463 (1993). Here, the ban on literature distribution, as well as the one on solicitation “in work areas,” is outright. Inherently, it includes conduct seeking support for unions, as well as seeking support for “mutual aid or protection.” Accordingly, so broad a prohibition interferes with employee exercise of statutorily protected rights.

Although the Employee Handbook appears intended to replace the “HANDBOOK FOR NON-MANAGERIAL STAFF,” as discussed in section I.B, there is no evidence that such a message has been communicated to all of the facility’s employees. To the contrary, there is evidence that at least one employee—Ryan—never received a copy of the Employee Handbook and was unaware of its existence. As a result, the conduct of employees who neither received a copy, nor were aware of issuance of the Employee Handbook, continues to be guided by the confidentiality prohibition of the handbook issued during January 1990.

That rule includes information pertaining to the “facility” as “confidential” and, then, states that, “Deliberate disclosure of confidential information may be interpreted as an invasion of privacy and can result in civil liability and/or criminal prosecution.” At no point in that rule, nor elsewhere in the handbook, is “facility” defined. In con-

sequence, this aspect of that rule is no less broadly worded on its face, or ambiguous, than the “employee or business information” portion of the Employee Handbook’s prohibition. That is, the 1990 rule no less could “reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment,” *Pontiac Osteopathic Hospital*, supra, and, thus, also violates Section 8(a)(1) of the Act.

Respondent contends that no employee ever has been disciplined, much less discharged, for violating any of the foregoing rules. But such an argument misses the point. If the rule deters protected concerted activity, obviously there would be no need to discipline anyone to prevent employees from engaging in statutorily protected activity. That is, “mere maintenance of such . . . rule[s] serves to inhibit employees from engaging in otherwise protected organizational activity, and, therefore, the absence of evidence of enforcement . . . does not preclude the finding of a violation or the issuance of a remedial order.” *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

CONCLUSIONS OF LAW

Care Initiatives, Inc., d/b/a Indian Hills Care Center has committed unfair labor practices affecting commerce by maintaining rules prohibiting employees from communicating “facility” information and which state that, “Unauthorized release of employee or business information may result in disciplinary action up to and including discharge,” and by maintaining rules that prohibit employees from engaging in solicitation “in work areas” and from distributing “printed or written literature at any time in the facility, even when you are off-duty”; by coercively interrogating an employee about her suspected union and concerted activity for mutual aid or protection; by threatening an employee with loss of her nursing license and asking for her resignation because she engaged in suspected union activity or concerted activity for mutual aid or protection; by prohibiting an employee from discussing employment concerns with anyone other than its administrator; and by discharging Christine Ellen Ryan for nonflagrant and nonegregious conduct provoked by unlawful statements concerning her suspected union and concerted activities for mutual aid or protection, in violation of Section 8(a)(1) of the Act.

REMEDY

Having concluded that Care Initiatives, Inc., d/b/a Indian Hills Care Center has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to remove from its Employee Handbook that portion of the “Confidentiality” rule which states that, “Unauthorized release of employee or business information may result in disciplinary action up to and including discharge” and those portions of the “Sales and Solicitation” rule that state that, “You are not permitted to distribute or post any printed or written literature at any time in this facility, even when you are off-duty” and that employees are not allowed to solicit coworkers “in work areas.” It shall also either notify all employees, in writing, that the HANDBOOK FOR NON-MANAGERIAL STAFF is

no longer effective and has been superseded by the employee handbook or, alternatively, remove from its resident and facility confidentiality rule the word “facility.” In addition, it shall distribute to all employees copies of the current handbook(s) with those rules so revised. *Alaska Pulp Corp.*, 300 NLRB 232, 244, 245 (1990), *enfd. mem.* 944 F.2d 909 (9th Cir. 1991); *Handicabs, Inc.*, *supra*, 318 NLRB No. 63, JD slip op. at 10, 11.

Furthermore, it shall be ordered to offer immediate and full reinstatement to Christine Ellen Ryan, dismissing, if necessary, anyone who may have been hired or assigned to the position from which she had been unlawfully discharged on January 27, 1995, or if that position no longer exists, to a

substantially equivalent position, without prejudice to her seniority or other rights and privileges. In addition, it shall be ordered to remove from its files any references to that unlawful discharge of Ryan, notifying her in writing that it has done so, and, further, it shall be ordered to make Ryan whole for any loss of pay and benefits suffered because of her unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]